



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 20, 1996

Ms. Laura S. Portwood  
Senior Assistant City Attorney  
City of Houston  
P. O. Box 1562  
Houston, Texas 77251-1562

Ms. Tracy Calabrese  
Assistant City Attorney  
City of Houston  
P. O. Box 1562  
Houston, Texas 77251-1562

OR96-1503

Dear Ms. Portwood and Ms. Calabrese:

You have asked this office to determine if information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. The City of Houston (the "city") received related written requests for information from two requestors, concerning information which you claim is the subject of a civil lawsuit pending in federal court. We assigned your requests ID# 100199 and ID# 100933.

Specifically, the city received requests for information relating to the Houston Fire Department's ("HFD") recruiting guidelines, evaluations and procedures. You state that you have released much of the requested information.<sup>1</sup> You have submitted a copy of the requestors' letters, a copy of court documents evidencing pending litigation and a representative sample of the available requested records for our review. You contend that the information is excepted from disclosure under sections 552.101, 552.102 and 552.103 of the Government Code. Additionally, you have submitted an affidavit from a senior assistant city attorney responsible for the defense of the city in connection with the lawsuit, which attests that the documents sought "clearly relate to the pending []

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<sup>1</sup>In this letter, we will address only those documents which you claim are excepted from public disclosure.

litigation.” We have considered the exceptions you claimed and have reviewed the documents at issue.

Section 552.103(a) was intended to prevent the use of the Open Records Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 (1989) at 4. The “litigation exception” enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 (1990) at 3-4 (discussion of relation of Open Records Act to discovery process). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5, 511 (1988) at 3.

Section 552.103(a), the “litigation exception,” excepts from required public disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party; and,
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information “relates” to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). You assert that much of the information submitted is excepted from required public disclosure under section 552.103 of the Government Code, based on a lawsuit styled *John Woodland, et al. v. City of Houston, et al.*, Civil Action H-82-1076, in the United States District Court for the Southern District, Houston Division. The lawsuit relates to, among other claims, alleged violations of the applicants’ privacy rights in the pre-employment screening process by the HFD.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. As we have stated above, to show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated, and that (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, *writ ref’d n.r.e.*); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for the information to be excepted under section 552.103(a). You have submitted copies of court documents for our review.

Accordingly, you have satisfied the first prong by demonstrating that the city is a party to the pending litigation.

In order to secure the protection of the "litigation exception," the second prong of section 552.103(a) requires that a governmental body demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision Nos. 588 (1991), 551 (1990). You assert that section 552.103 applies, because the information sought by the requestor relates to the litigation in which the city is a party, as evidenced by the court documents. We have examined the information and documents submitted to us for review. In this instance you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103(a); therefore, the requested records may be withheld.<sup>2</sup>

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Finally, the applicability of section 552.103(a) generally ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>3</sup>

Regarding the remaining portions of the open records requests, you indicate that there are no responsive documents to the request for "list of persons called for polygraphs" and "final ranking list." Since the act only applies to information in existence and does not require a governmental body to prepare new information, and based on your representation that the department has no responsive documents with regard to this request, we conclude that the department need not respond to this aspect of the request. See Open Records Decision No. 605 (1992); Open Records Decision No. 445 (1986) (Open Records Act does not require governmental body to obtain information not in its possession or to prepare new information in response to open records request).

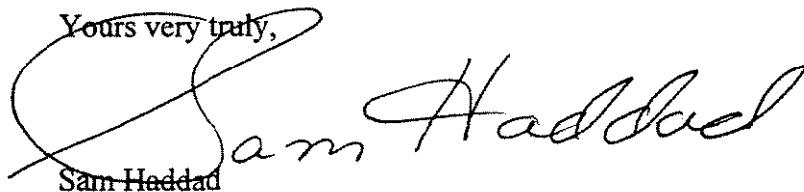
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<sup>2</sup>Because we find that you may withhold the requested information under section 552.103, we do not determine whether specific information may be withheld under sections 552.101 and 552.102.

<sup>3</sup>However, information deemed confidential by law may not be waived and should continue to be withheld once the litigation has concluded. Open Records Decision Nos. 490 (1988), 463 (1987). For your convenience, we have included a sampling of common types of information deemed confidential. We caution that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. See Gov't Code § 552.352 (providing penalties for improper release of confidential information).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is fluid and cursive, with the first name "Sam" being more prominent than the last name "Haddad".

Sam Haddad

Assistant Attorney General  
Open Records Division

SH/cbh

Ref.: ID# 100199 and ID# 100933

Enclosures: Submitted and marked documents  
List of Confidential Information

cc: Mr. Warren Ducote  
9966 West Shore Drive  
Willis, Texas 77372  
(w/o enclosures)

Mr. Larry Watts  
3923 El James  
Spring, Texas 77388  
(w/o enclosures)